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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 8

MEMPHIS & CHARLESTON RAILWAY CO.,
Appellant,

VS.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al., Appellees.

Appeal from the Supreme Court of the State of Missisippi.

BRIEF OF ATTORNEY GENERAL OF MISSISSIPPI AS AMICUS CURIAE.

GEO. T. MITCHELL,
Attorney-General of Mississippi,
and
J. A. LAUDERDALE,
Assistant Attorney General.

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IN THE SUPREME COURT OF THE UNITED STATES

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NO. 8.
(No. 276, October Term, 1929)

MEMPHIS & CHARLESTON RAILWAY CO.,
Appellant,

VS.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM

Appeal from the Supreme Court of the State of Mississippi.

BRIEF OF ATTORNEY GENERAL OF MISSISSIPPI, AMICUS CURIAE.

May it Please the Court:

The Attorney General of Mississippi has not, until recently, considered it at all necessary to ask to be heard on this appeal. All of the principal phases of the case seem to have been covered by counsel of record. But it has now been brought to our attention that the relatively small tax levied upon the appellant railroad in the Oldham Road Dis-

trict involves interests of vastly greater importance; and inasmuch as the Court has now ordered this case back to the docket for a re-argument, we deem it not inappropriate that the State of Mississippi, acting through its Law Department, should have asked leave of Court to bring to the Court's attention certain matters which are of peculiar interest and importance to the State itself and to its credit.

The amount of the tax shown by the record as falling upon the appellant is but $450 per year. This relatively small amount may not be quite so petty as to bring the case within the principle stated in the maxim, de minimis non curat lex. But it is so small as to make us wonder why the complainant, the appellant, should deem it necessary in the protection of its own interests to jeopardize the credit of one of the sovereign states, and to bring injury and in some cases misery perhaps to thousands of the holders of its public securities.

The few questions which we will discuss are those having to do with estoppel and laches; the abandoment of the case presented in the Mississippi Courts and the substitution therefor of a case not pleaded; a false issue involving a serious charge against the State of Mississippi; a new case (not pleaded) involving a charge that local officials were guilty of actual fraud against the appellant in the laying out of the district; a few comments that the special act which validated this district was not attacked by the bill of complaint; and a short discussion of the facts distinguishing the Legislation of Mississippi from that of

Texas, which was held invalid in *Browning vs. Hooper*, 269 U. S. 396.

BRIEF

I.

Appellant has abandoned the cause pleaded in the bill and now attempts to present a new case. The attack in the Mississippi Courts was directed solely to the point that the Mississippi legislation was void. The abandonment of this position is shown in appellant's "Statement as to Jurisdiction on Appeal," p. 6, as follows:

> "This judgment" (in the Supreme Court of Mississippi) "of the State's highest court foreclosed a review in this court of all technical questions considered below, having to do with the original creation of the special district * * *."

The case now presented is, in effect, that a valid statute has been misapplied by local officials so as fraudently to bring into the district property of the appellant which equitably should have been excluded.

II.

The appellant's case is barred by its laches and delay in the filing of its bill.

(a) More than a year elapsed after the organization of the district before the appellant challenged the tax complained of.

(b) During all that period the district and its officials functioned regularly, issuing its bonds, constructing roads with their proceeds, and levying taxes.

(c) Any objection to a tax should be made promptly, because (1) the functions of government depend upon the collection of taxes. (2) The integrity of bond issues secured by taxes should not be jeopardized by objections coming after undue delay. (3) The rules of law as to laches of individuals do not apply in cases of public corporations levying taxes.

Lyons vs. School District, 311 Mo. 349, 367, 368 l. c.

16 Am. & Eng. Ency. Law (2 Ed.) 363.

Pomeroy's Equitable Remedies (1 Ed.) Sec. 21.

High on Injunction (4 Ed.) Sec. 418, p. 696.

Kennedy vs. Montgomery County, 38 S. W. (Tenn.) 1075.

III.

The special act (Ch. 1080, Laws of Miss. 1926) which validated the organization of the Oldham Road District, was not attacked by the appellants bill of complaint.

IV.

The Mississippi road legislation does not fall in the same class with that of Texas, which was held invalid in *Browning vs. Hooper*, 269 U. S. 396.

Memphis & Charleston Railway Company vs. Bullen, 154 Miss. 536; 121 So. 826;

Opinion of Mississippi Supreme Court, Tr. Rec., pp. 231-237;

St. Louis & Southwestern Railway Company vs. Nattin, 277 U. S. 157;

Hancock vs. Muskogee, 250 U . S. 454;

Valley Farms Co. vs. Weschester County, 261 U. S. 155.

APPELLANT HAS ABANDONED THE ONLY CAUSE PLEADED, AND NOW BRINGS FORWARD A CASE NOT PLEADED.

In the lower courts the appellant's sole attack was against the legislation of Mississippi. It was urged that the tax complained of was void because the act (Ch. 277 of 1920) under which the district was organized and the tax levied was unconstitutional. No other position was taken. All the averments of the bill went to this one allegation, namely, that the Mississippi legislation was void. No point was made, either in the pleadings or briefs, that a fraud had been committed by local authorities in the organization of the district, under a valid act, by so laying out the district as fraudently to draw into it property of the appellant which should have been left out. We repeat that the bill contains no such averment. The appellant has abandoned in this court the position which it took in the Mississippi courts. And it now attempts to take a position not supported by its own bill. An analysis of the bill, nay, even a cursory reading of it, will show that there is no charge whatever of any legislative or official fraud in the laying out of the district intended to accomplish the wicked purpose of drawing into the district, in order to tax, property which equitably and rightly should not be taxed. And it is

a false issue, but one which is interwoven with other argument, to urge that Chapter 277 of the Laws of Mississippi of 1920 actually provides a method for the depriving persons of their property without due process of law. This is a most serious charge against the State of Mississippi, and one which should not be sustained by the highest court in the land, unless a much clearer case should be made than has been made here.

If Chapter 277 is void because it *might* be the means of official injustice, then every statute requiring official action of any kind should be held void; a clear reductio ad absurdum. For, of course, any official or board charged with the exercise of public functions of any kind may be guilty of oppression in office and thereby twist and stretch a valid enactment to tyrannous purposes. But the act remains valid for all that, and in spite of its official misuse in some particular case. And, now, the point here is simply this, that the appellant did not plead, nor did he argue below, that a valid enactment had been thus used to commit a fraud. And therefore it may not now present such a case.

ESTOPPEL

The issue of estoppel which was tendered by the answer is most important to the State of Mississippi; because if the appellant should be successful in its (now abandoned) attack on the validity of the Mississippi road district legislation; or if it should be successful even as to the tax against itself (although the position now taken was not pleaded in its bill); and if the appellant's case be not barred

by its estoppel or laches, then a flood of litigation will ensue, involving scores and perhaps hundreds of other districts similarly situated; districts which have uttered bonds, and where the result in this case will be used to undo the constructive work that has been accomplished throughout the State.

The allegations of the answer as to estoppel and laches will be found at pages 28 and 29 of the transcript of the record. There the substance of the allegations is that the appellant's own conduct and laches in the bringing of this cause (i. e. its delays) are at variance with the position taken by it when it was its duty to speak and when it failed and neglected to speak; that it had all due and proper notice of the organization of the district and of the uttering of its obligations; that it neglected to avail itself of its privilege to appeal the cause from the judgment of the Board of Supervisors of Tishomingo County and allowed the same to be adjudicated and made final, and therein acquiesced; that if it did not actually know of these matters, it was its business to know; and that it was chargeable with knowledge in due course and under ordinary diligence and care; that after the organization of the district its bonds were sold under most unusual and delicate circumstances, namely, at a time when bond issues in Mississippi were being scrutinized because of the then recent decision in Browning vs. Hooper, and when other states were readjusting their obligations, and certain State Legislatures were passing validating acts; that the appellant could not escape knowledge of the passage of the general validating act by the State of Mississippi and of the passage of the special act

which validated the Oldham Road District, an act which took effect on the 11th day of March, 1926; that it had full notice of the legislative acts referred to in the bill; that it, the appellant, acquiesced, raised no protests and no objections, served no notice on the Board of Supervisors of Tishomingo County or on the Commisioners of the Oldham Road District, nor to the general public, that appellant intended to contest the validity of the bonds of the district and the acts of the Board of Supervisors in levying taxes to meet those obligations, but that the appellant stood idly by and allowed the bonds to be sold to innocent purchasers for value, and to be put on the market at par, and also stood by and saw the funds received as the proceeds of the bond sale expended in and upon the roads in the district.

The appellant could have been heard by the local administrative court, the Board of Supervisors of the County, had it so desired, at the time of the organization of the district.

It could have appealed from the action of the Board of Supervisors and lodged the matter in the courts of law.

Hemmingway's Annotated Mississippi Code, 1927, Section 60.

The District was organized by proceedings had before the Board of Supervisors of Tishomingo County in January and February, 1926. (Tr. of Rec., p. 47). The appellant took no steps to contest either the organization of the district or the levying of taxes therein, nor the issuance of its bonds, until May 14, 1927, the day when the bill of

complaint was filed. In the meantime the appellant had knowledge, actual or constructive, of the proceedings before the Board of Supervisors, and of the passage by the Legislature of the general validating act of 1926, namely, Chapter 278; knowledge also, actual or constructive, of the passage by the Legislature of the special act for the validation of this particular district (Chapter 1080 of 1926), its organization, its bonds, its tax levies, and its continued existence; and that this act became effective March 11, 1926. Still the bonds of the district were not sold and delivered to a purchaser for a matter of about two months, namely, until May 19, 1926. (Tr. Rec. p. 179). During these two months the appellant could have moved by bill in equity or otherwise to prevent the issuance of the bonds of an allegedly void district; but it was nearly a year after the bonds were delivered and sold before the bill of complaint was filed. (Tr. Rec. pp. 1 to 17, incl.)

In the meantime, namely on or before the first Monday in April, it had become the statutory duty of the appellant railroad company to file with the State Tax Commission a complete schedule, under oath, of all of its property, real or personal, setting forth its mileage, switches, etc., in "each county of the State and in each city * * * road district * * *" (Tr. Rec. p. 152-153). If, therefore, appellant complied with the requirement of this statute (2 Hem. Code of 1927, Sec. 9369), it then had actual knowledge of the existence of this road district, or surely local and state authorities would have imposed the penalty for failure to file the schedule, as provided in Section 9370, Hemingway's Code of 1927, Vol. 2 (Tr. Rec. p. 154). And if appellant felt

that it had any cause of complaint, it could have moved to prevent the sale and delivery of the bonds of the district, which did not occur until about seven weeks after the first of April.

As a matter of fact, the record discloses that on June 2, 1926, the State Tax Commission addressed a communication to the appellant, enclosing descriptions of certain road and school districts, and requesting the railroad, if it had property in the district, to let the Commission know about when the assessment covering the same could be furnished. On July 23, 1926, the railroad's Tax Commissioner addressed the Secretary of the State Tax Commission, in response to the said letter of the latter dated June 2nd, and with this response of July 23rd the railroad forwarded a "statement of this company's property in Oldham Road District, Tishomingo County, Mississippi, as of February 1, 1926." (Tr. Rec. pp. 128 to 130 incl.)

In the meantime the bonds of the district had been disposed of, on May 19, 1926, but the proceeds had not been disbursed in the construction of roads in the district. And, therefore, if at the time when the appellant, for all practical purposes, recognized, or acquiesced in, the existence of the district, by its response of July 23rd to the State Tax Commission, it could, and should, have then and there made its objections and taken proper legal steps to prevent the expenditure of the funds derived from the sale of the bonds until after their legality might have been determined. The appellant, however, did nothing, and so far as this record goes seems never to have called upon either the Commis-

sioners (the governing body) of the District, or the Board of Supervisors of the County, the taxing authority of the district, under whose order the bonds had been issued, to desist from further activities in the district. The appellant made its return of taxable property located in this road district on July 23, 1926. It seems to have done nothing whatsoever by way of objecting to the existence of the district for more than nine months thereafter.

It is inconceivable that the vigilant officials of a great railroad system were not fully advised of all proceedings that were being had in one of the counties through which its line runs, from their very inception, namely, in January, or at least in February, 1926. It is inconceivable that its legislative agents could not have known, and did not know, of the activities going on in the Legislature in February and March, 1926. It is inconceivable that its tax agents did not know of the existence of this district prior to April, 1926, when it became their duty to make return to the State Tax Commission of schedules of the appellant's property lying in each road district. But if, perchance, the existence of this district really did escape the knowledge of all of the officials of the appellant railroad, the record shows quite clearly that they had actual knowledge in June, 1926, when they received the request of June 2 of the State Tax Commission for a return of property in this Oldham Road District. And certainly from that time forward, if not before, it was the duty of appellant promptly to act to prevent loss and injury to others, as well as to protect its own rights. And if any of its property rights were being infringed upon, it was its duty to act in the assertion

thereof, before the rights of innocent third parties had come into being. It could have filed this bill, have made the Treasurer of the District a party, and could have moved to impound the proceeds of the sale of the bonds of the district, and thereby held matters in abeyance until its rights were determined. By its failure to take such reasonable steps for the protection of others it has waived any rights that it ever might have had to contest the validity of said bonds, or to contest the legality of the organization of the district, or the tax levied or to be levied for their payment. By not proceeding promptly and by delaying action for the relatively long period of nine or ten months, until May 14, 1927, the appellant acquiesced in all the prior proceedings.

That the proceeds of the sale of the bonds were still on hand during all this period, that is, until after July, 1926, is evidenced by the facts shown at page 56 et seq. of the transcript of the record, where it appears that the roads to be improved in this district were not decided upon until after June 9, 1926; that two of the Commissioners of the district previously appointed were removed by order of the Board of Supervisors of the County on said June 9th; that thereupon two other persons were appointed to serve as road commissioners for the Oldham Road District (Tr. Rec. p. 58); and that the Board of Commissioners did not ask permission of the Board of Supervisors to go forward with the work of road construction until July 15th. The record does not disclose the date when the first disbursement of funds for road construction in this district was made, but it could not have been until after said July 15, 1926.

We respectfully submit that the appellant is estopped and its alleged cause of action is barred by its own laches or acquiescence.

There is no hard and fast rule to the period of time within which objections to a tax should be made, and beyond which an action to contest the validity of the tax will be barred by laches.

Objection to a tax should be made promptly, because (a) the functions of government depend upon the collection of taxes; (b) the integrity of bond issues or other public securities issued on the security of taxes must not be jeopardized by objections which come after undue delay; and (c) the rules of law as to laches of individuals or private corporations are not to be applied in cases of public corporations levying taxes.

Lyons vs. School District, 311 Mo. 349, 367, 368 l. c. 16 Am. & Eng. Ency. Law (2 Ed.) 363.

In Lyons vs. School District, 311 Mo. 349, a taxpayer sought to enjoin a certain school tax in excess of a limit fixed by the State Constitution; but partly for interest on bonded indebtedness and partly for building and repairs. The tax for building and repairs was voted at an election held in April. Subsequently it was certified by school officials to the Clerk of the County Court charges with the duty of extending the tax. Contracts were made on the strength of these anticipated taxes and the effect of an injunction against the tax would have been to render these contracts invalid and jeopardize the integrity of a bond is-

sue. The Supreme Court of Missouri sustained a demurrer to the bill and denied injunctive relief, and in passing upon the case used this language (l. c. 367, 368):

> "In the period after the voting a levy of taxes, and upon the credit thereof, contracts are made in anticipation of the opening and the necessary maintenance of the schools. It is apparent that at the time the suit was filed a considerable part of the taxes must have been paid, and before the time of its determination the greater portion would be paid. It is true, as urged by counsel for plaintiff, that injunction is a proper remedy to enjoin the collection of taxes levied in excess of the rates allowed by the Constitution, or without authority of law. But, there are other conditions precedent to the proper exercise of such a remedy. In such cases the injury to the complaining party must appear to be substantial, and not disproportionate to the relief sought or to the loss and inconvenience of others and of the public, and the application for the remedy must be seasonably made in view of all the conditions. Counsel cite authorities for the contention that before a court can sustain a demurrer on the ground of laches, the petition must disclose upon its face that the defendant was prejudiced, or put to some disadvantage by the delay, and also that it must appear the plaintiff had knowledge, during the delay, of the facts and of his rights. The cases cited upon this point are cases dealing with private controversies, with facts arising out of the acts of private persons, and not in matters involving the exercise by a public corporation or public quasi-corporation, of the powers of taxation and expenditure of public moneys, accord-

ing to the statutory and constitutional provisions, begun upon notice to the public, taking form at stated times prescribed by law, and involving matters of interest to all that part of the public within a given district. The acts set out in the petition are the acts of public officials affecting all members of the corporate community, of which plaintiff was also a member.

Not only is the question of what constitutes laches in a given case, a question for the exercise of a sound discretion by the court, but the property of the issuance of an injunction in a given case is also a matter wherein a sound discretion is to be exercised. This rule is well stated in *Tanner vs. Lindell Railway Co.*, 180 Mo. 18. There, it is said: 'But the issuance of an injunction even when promptly applied for is always in the sound judicial discretion of the court. The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy, and it may be said, as a general rule, that an injunction will not be granted when it will be productive of greater injury than will result from a refusal of it. This rule is especially applicable when the party applying for an injunction has by his own laches made it impossible to grant the injunction without inflicting serious injury on the party so to be enjoined. In determining which way the balance of convenience lies, the resultant benefit and detriment to the parties litigant are not the only matters to be considered. The court will also consider the injuries which may be inflicted on strangers to the suit and to the public generally.' (16 Am. & Eng. Ency. Law (2 Ed. 363.). That doctrine was announced by this court in *Bailey vs. Culver*, 84 Mo. 540."

And in such cases as this, and especially after the delay of more than a year from the time when the bond tax was levied by the Board of Supervisors, and nearly a year after appellant's officers had actual knowledge of the existence of the tax, it is absolutely essential to the complainant's case that it should have pleaded any facts which might have tended to excuse its delay in taking action against the tax.

Pomeroy's Equitable Remedies (1 Ed.) Sec. 21.

High on Injunction (4 Ed.) Sec. 418, p. 696.

Lyons vs. School District, 311 Mo. 349.

Kennedy vs. Montgomery County, 38 S. W. (Tenn.) 1075.

And the case being otherwise, complainant (appellant) should be denied relief.

THE SPECIAL VALIDATING ACT (CH. 1080, 1926) WAS NOT ATTACKED BY THE BILL.

Even if there could have been any sound argument urged against the validity of the legislation under which this district was organized; and even if its organization might have been questioned, all possible irregularity and invalidity have been wiped out by the enactment, in 1926, of Chapter 1080 of the Laws of Mississippi for that year. This is the special validating act similar in character to several hundred others enacted at the same session for the same purpose, and wherein and whereby the Legislature of Mississippi undertook to set at rest any doubt as to the attitude of the State itself with respect to such a district as this.

Memphis & Charlston Ry. Co. vs. Bullen, 154 Miss. 536; 121 So. 826; Tr. of Rec. pp. 231-247.

The State, acting through its legislative department, proclaimed to the world that whatever the Oldham Road District might otherwise have been, it should then and from thenceforth be known as a taxing district, whose organization was validated and vouched for and continued by the Legislature itself, and whose bonds and other obligations should not be questioned.

It is significant that while the prayer of the bill asks the courts to hold that certain acts of Mississippi are unstitutional, there was no such prayer as to this Chapter 1080 of 1926. It is also significant that there was no allegation in the bill that this act was unconstitutional. And the allegation of the answer is correct, that this act "makes and constitutes the Oldham Road District and all the obligations and undertakings incurred by the terms and conditions of said bonds the creature and the act of the Legislature of the State of Mississippi, and gives it a permanent status as such." (Tr. of Rec., pp. 29 and 30.)

THE MISSISSIPPI ROAD DISTRICT ACT (CH. 277 OF 1920) IS IN NO WAY SIMILAR TO THE TEXAS DISTRICT WHICH WAS CONDEMNED IN

Browning vs. Hooper, 269 U. S. 396; 70 L. Ed. 330.

We find that this case has been cited and so fully discussed by briefs of opposing counsel that perhaps the Law Department of the State should not take the time of the

Court by further discussion. But we wish to add one or two things, and, among others, that the State is most vitally interested in repelling the charge and meeting the argument of appellant, that the State's legislation with respect to road districts is subject to the same condemnation which was leveled against the road district legislation of Texas. The statutes of the two states were and are radically different from each other. Those differences have been pointed out in the brief of the appellees, and we shall now do no more than to recapitulate:

1. In the Texas case the petitioners for the organization of the district decided upon the location of a single road. Under the Mississippi statute the petitioners had no such right or authority, and in the present case the two roads which at the time when this case was tried in the Chancery Court had been constructed, had however not been selected until some four or five months after the organization of the district, and after the appointment of road commissioners, and after the approval of the Board of Supervisors. (Tr. Rec. pp. 56 and 57).

2. The Texas statute conferred no authority upon the local court (County Commissioners' Court) to refuse to establish the district. In Mississippi, the Board of Supervisors exercises its discretion in the matter of sustaining or denying the petition.

Prather vs. Googe, 108 Miss. 670; 67 So. 156.

Memphis & Charleston vs. Bullen, 154 Miss. 536; 121 So. 826. (Tr. Rec. pp. 231-247).

3. The Texas statute was held, in *Browning vs. Hooper*, supra, as authorizing the creation by the local court of a local improvement special assessment type of district. The Mississippi statute, Chapter 277 of 1920, provides for the organization of ad valorem districts only.

4. The Texas statute sought to impose on lands in the district "special assessments for local improvements;" while the Mississippi statute provides for district taxes to be levied ad valorem on every kind and character of property subject to taxation.

5. Under the Texas statute road districts were not created by the Legislature, nor was there any delegation of legislative authority. In Mississippi the Legislature has delegated to the Board of Supervisors of any county the discretionary power to organize such a district, which, when thus created, becomes a municipality, to which the State has granted full legislative powers, subject to the approval of the Board of Supervisors.

(See Ch. 277, Laws of Miss. 1920, Tr. Rec., pp. 139 et seq.)

St. Louis & Southwestern Railway Company vs. E. H. Nattin, Tax Collector, 277 U. S. 157.

Hancock vs. Muskogee, 250 U. S. 454;

Valley Farms Co. vs. Westchester County, 261 U. S. 155.

6. The Mississippi road district legislation is, as above stated, radically different from the road legislation of

Texas, condemned in *Browning vs. Hooper*, and is more nearly like that of Louisiana, which this Court sustained in *St. Louis & Southwestern Railway Company vs. Nattin*, 277 U. S. 157.

Respectfully submitted,

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